89-871

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

COMMONWEALTH OF KENTUCKY — PETITIONER

versus

CHRISTOPHER CHARLES WALLS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

I.

DOES DUE PROCESS REQUIRE SEPARATE TRIALS WHERE A NON-TESTIFYING CO-DEFENDANT, WHOSE EXTRAJUDICIAL CONFESSION IS "SANITIZED" TO PROTECT THE RIGHTS OF THE OTHER DEFENDANT, COMPLAINS THAT THE EXCULPATORY EFFECT OF HIS CONFESSION IS WEAKENED BY NOT NAMING HIS ACCOMPLICE AND THAT OTHER EVIDENCE WOULD NOT BE ADMISSIBLE IN A SEPARATE TRIAL?

II.

DO THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THE STATES IN CAPITAL CASES TO EXCUSE ALL PROCEDURAL DEFAULTS NOT OBVIOUSLY ATTRIBUTABLE TO TRIAL STRATEGY?

III.

MAY ONLY ONE DEATH SENTENCE BE IMPOSED WHEN ONE VICTIM IS BOTH KIDNAPPED AND MURDERED?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATE STATUTES

The Attorney General of Kentucky respectfully petitions this Court for a writ of certiorari to review the judgment of the Kentucky Supreme Court.

OPINION BELOW

The opinion below was originally issued on June 9, 1989 and is reproduced at pages 2a-27a of the appendix to this petition. On September 28, 1989 the court below issued an order expressly denying Respondent's timely petition for rehearing. (Appendix 1a). Without referring to Kentucky's petition for rehearing, that order implicitly granted partial relief by modifying seven pages of the original 14-page majority opinion and one page of the original two-page dissenting opinion. (Id.). Additions to the original opinion appear in double brackets, and deletions are double underscored. (Appendix 6a, 9a, 10a, 15a, 24a, 25a, 27a). The

modified opinion below is reported at Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989).

JURISDICTION

The opinion below by the Kentucky Supreme Court became final on September 28, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

The Eighth Amendment to the United States Constitution provides in relevant part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Respondent and his jointly-tried co-defendant, Teddy Lee Cosby, were kitchen employees at a Louisville restaurant. (TE VI 30, 69-71, 76-77). Each was experiencing financial difficulties so serious that the other employees knew it. (TE VI 60-61, 71, 116; VIII 21-23). Cosby's telephone had recently been disconnected due to utility arrearages. (TE VI 71; VII 14; VIII 21-23). Seventeen days before the crimes, he borrowed money from a fellow employee to make the down payment on a car. (TE VIII 15-16). His car payments were $392 every two weeks. (TE VII 14). Respondent was so far

behind on his rent that he had received an eviction notice. (TE VI 60-61; VII 13).

For approximately three weeks prior to the crimes, Respondent and Cosby exhibited unusual interest in the restaurant's daily receipts. (TE VI 58, 78-79). All the employees showed some interest but Respondent and Cosby asked about it daily, even while off duty. (Id.).

On or about November 1, 1984 about three weeks before the crimes, Respondent told employee Cheryl Geoghegan that he was planning a robbery. (TE VII 60, 74). He asked to borrow a gun, explaining that any witnesses to the crime would have to be silenced. (TE VII 60-61). She refused to loan him the gun. (TE VII 61). Respondent planned for his victim to be one of the restaurant's assistant managers, either Kevin Miller or Scott Hunter. (TE VI 56; VII 62, 72). Respondent's plan was to kill his robbery victim, place the corpse inside the

trunk of a car, and submerge it in a pond at Fisherman's Park in Louisville. (TE VII 62).

Respondent told Cheryl that he had approached yet another employee about this plan. (TE VII 63). Apparently he was referring to either Marty Patterson or co-defendant Cosby. (TE VI 116-117; VII 64-66).

At 10:45 p.m. November 25, 1984, Respondent and Cosby were seen sitting in the former's car outside the restaurant. (TE VI 29-30, 44, 46). At the sight of two witnesses, Respondent moved the car to the other side of the building. (TE VI 31). Forty-five minutes later, after assistant manager Kevin Miller had closed the restaurant, Respondent persuaded him to open the door so that he supposedly could get something from his locker. (TE VI 19-20). Kevin's girlfriend left at this time, but after eating at a restaurant across the street she noticed that his car was still there. (TE VI 18-23).

Before the abduction, she was the last person to see Kevin alive. (Id.).

When they returned to Respondent's apartment, Cosby removed a small box from the getaway car and placed it inside the trunk of his own car. (TE X 25-26). Afterwards, at 1:00 or 1:30 a.m., Cosby repaid a small debt to a security guard at the apartment complex and, still later, was able to loan him a small amount of money. (TE VIII 7). Several hours later, Respondent paid his landlord a $500 rent arrearage. (TE VII 13). In addition to a $275 check, Respondent gave the apartment manager 45 $5 bills. (Id.).

Miller's corpse was found in a pond at Fisherman's Park the next day. (TE IV 13). He had been stabbed three times in the back, three times in the chest, and his throat had been slashed. (TE VI 104-106). His vocal cords had been severed, and his fingertip had been freshly

cut but had a band-aid on it. (TE VI 106, 110, 113-114). In addition, there was a hemorrhage underneath his scalp, above and behind the right ear. (TE VI 108). There were blood stains on the ground in two places. (TE VII 5). A boning knife was found sticking in the mud next to the pond. (TE VII 10).

The restaurant safe had been emptied, and cash register tapes had been removed from a desk inside the office. (TE VI 60, 65-66). Miller's car was still parked outside. (TE VI 67). Type "B" blood was found on the bank deposit bag inside the office -- Cosby had type "B" blood, but not Respondent or the victim. (TE XII 20, 22, 51-53). Blood found on the safe and on the desk matched that of the victim, whose finger had been freshly cut according to the medical examiner. (TE VI 66; VII 53). Respondent has type "A" blood, none of which was identified at either the robbery scene or the murder scene. (TE VII 53).

One of the witnesses who had seen the getaway car parked outside the restaurant, positively identified Cosby from a group of photographs. (TE VI 46; VII 31-32). Cosby admitted to his own wife, the police, and a fellow employee, that he and Respondent had been together that evening but denied any wrongdoing. (TE VII 28-30; VIII 20; X 55, 61-63; XII 9-10).

Respondent gave police a full confession two days after these crimes. (TE IX 41-100). It followed an express waiver of his constitutional rights and was tape recorded. (TE IX 41). The transcript of Respondent's confession was edited for the jury so as to avoid any direct implication of Cosby. (TE VII 56-58; IX 51-100). It is consistent with the physical and testimonial evidence introduced at trial. (TE IX 41-100). To summarize Respondent's confession:

1. Cheryl Geoghegan's account of the plan was accurate in every detail. (TE IX 54, 74-76, 83, 85, 93-94). It was Respondent's idea. (TE IX 77-78).

2. Cosby, whose blood type was found on the money bag, cut the victim, whose blood was found on the restaurant office desk, in forcing the latter to open the safe. (TE IX 48-49). It was Respondent who placed the band-aid on the victim's finger. (TE IX 49-50).

3. Respondent drove Cosby and the victim to the place of execution. (TE IX 52). Immediately prior to his execution, the victim was allowed to smoke a last cigarette. (TE IX 58).

4. Cosby did the stabbing. (TE IX 59). The eighth and final stab wound, slashing the victim's throat and severing his vocal cords, was to silence the unpleasant sounds he made while gasping for breath. (TE IX 60). Cosby

wore gloves, and he covered the victim's mouth. (TE IX 61).

5. To throw the victim's corpse into the pond, Respondent gripped him by the feet while Cosby held him by the hands. (TE IX 62).

6. Respondent and Cosby stopped at a car wash before returning to the former's apartment where they divided the money. (TE IX 67-68).

A jury found Respondent and Cosby guilty of first-degree robbery (20-year sentence), capital kidnapping (death penalty), and capital murder (death penalty). (TR 429-431, 447-449, 519-520, 572-573).

On direct appeal of conviction to the Kentucky Supreme Court, Respondent raised 30 issues for review, 26 of which had not been preserved by contemporaneous objection. Neither of the grounds on which the state supreme court reversed had been preserved for appellate review.

REASONS FOR GRANTING CERTIORARI

I.

THE GOVERNMENT'S INTEREST IN JOINDER OF DEFENDANTS FOR TRIAL OUTWEIGHS ANY INTEREST THAT A NON-TESTIFYING CO-DEFENDANT HAS IN LEAVING HIS EXTRAJUDICIAL CONFESSION UNEDITED SO AS TO NAME HIS ACCOMPLICE, OR IN EXCLUDING EVIDENCE ADMISSIBLE ONLY AGAINST THE OTHER DEFENDANT.

The court below held that the joinder of defendants for trial unfairly prejudiced Respondent in three respects. First, although neither defendant requested separate trials, had the trial court ordered separate trials sua sponte Respondent's wife would not have been allowed to testify against Cosby. Because her testimony also mentioned Respondent, the Kentucky Supreme Court held that the better practice would have been to order separate trials sua sponte so as to avoid the possibility of error altogether: "This is an error that would never have occurred had the Commonwealth had the foresight to require separate trials."

Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 371 (1989).

Secondly, the state supreme court found that the joinder of defendants for trial somehow discouraged Respondent from testifying, which then prevented his defense lawyer from explaining to the jury why he had decided against taking the witness stand. Id. at 371.

Finally, the court below found that any exculpatory effect of Respondent's confession was "watered down" by deleting Cosby's name. Id. at 371.

In the original version of its opinion, the Kentucky Supreme Court repeatedly cited Kotteakos v. United States, 328 U.S. 750 (1946) as authority requiring severance of defendants for trial. (Appendix 9a, 15a). After Kentucky's petition for rehearing pointed out that Kotteakos did not discuss severance of defendants for trial, but instead dealt with

variances among the indictment, proof and jury instructions in a conspiracy case, the state supreme court modified its opinion by deleting the citations to Kotteakos. (Appendix 9a, 15a). Despite such deletions from the original Kentucky Supreme Court opinion, its decision on the separate trials issue still appears to rest on federal Due Process grounds. There is no assertion that the separate trials issue rests entirely on independent state law grounds.

Kentucky submits that Due Process does not require separate trials unless the joinder of defendants would result in a specific constitutional violation. United States v. Lane, 474 U.S. 438, 446, n.8 (1986). Only two years ago this Court held that the government's interest in joinder of defendants for trial outweighs the interest of a non-capital co-defendant in empanelling jurors opposed to

the death penalty. Buchanan v. Kentucky, 483 U.S. 402 (1987). Joint trials offer the jury a greater perspective on the whole case, avoid inconsistent verdicts, and enable the sentencer to assess relative culpability more reliably. Richardson v. Marsh, 481 U.S. 200 (1987). Even an improper joinder of defendants for trial does not necessarily result in a constitutional violation. Shaffer v. United States, 362 U.S. 511 (1960).

The three matters identified by the Kentucky Supreme Court as having arisen from the joinder of defendants in this case do not add up to a constitutional violation. The only detail Respondent's wife added to his confession was that he had washed his tennis shoes later that night, 776 S.W.2d at 371, and the evidence against him was already "overwhelming," Id. It was Respondent's decision to avoid the witness stand that prevented defense counsel from

"testifying" for him during his summation to the jury. Finally, at least two of the federal circuits have addressed Respondent's complaint that the removal of Cosby's name from his confession somehow weakened its exculpatory effect. See United States v. Kershner, 432 F.2d 1066, 1072 (5th Cir. 1970) and United States v. Hernandez, 608 F.2d 741, 748-749 (9th Cir. 1979), rejecting such a claim.

The fact that one defendant confesses and the other does not is an insufficient basis for holding that separate trials are constitutionally required. This Court should grant certiorari accordingly.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE STATE COURTS TO EXCUSE CAPITAL DEFENDANTS FROM THEIR PROCEDURAL RULES GOVERNING PRESERVATION OF ERROR FOR APPEAL.

Respondent raised 30 separate questions for appellate review, 26 of which had not been

preserved by contemporaneous objection. The state supreme court reversed Respondent's conviction on two unpreserved grounds (Questions #1 and #3 herein), holding that such excusal of his procedural default is required by the United States Constitution. Citing Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976), the Kentucky Supreme Court held that, "Our statute [KRS 532.075] and our standard of review is but a codification of the United States Supreme Court mandate." Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 369 (1989).

Neither Beck v. Alabama nor Woodson v. North Carolina stands for the proposition that capital defendants must be excused from the ordinary rules of procedure. Beck v. Alabama held that additional jury instructions on lesser degrees of homicide must be given if the evidence warrants them. Woodson v. North Carolina

similarly requires that a sentencing jury be permitted to spare a capital defendant's life in spite of any aggravating circumstances.

It appears that this Court has not yet addressed the precise question raised here. However, in the context of federal habeas corpus litigation the Court has held that a capital defendant is not excused from his procedural default simply because he has been sentenced to death. In Smith v. Murray, 477 U.S. 527 (1986), for example, this Court upheld the denial of a capital defendant's federal habeas corpus claim which had been preserved at trial by contemporaneous objection but abandoned on direct appeal to the Virginia Supreme Court. The procedural bar was enforced against the capital defendant in Smith just as it was against the non-capital defendant in Murray v. Carrier, 477 U.S. 478 (1986). Emphasizing the important societal interests in finality of

judgments, the Court indicated that defense counsel's inadvertence or failure to predict a change in the law would not establish "cause" for excusing a procedural default.

The Kentucky Supreme Court is laboring under the mistaken impression that the "death-is-different" approach required in evidentiary matters also requires a state appellate court to abandon its rules of procedure. In Murray v. Giarratano, ___ U.S. ___, 109 S.Ct. 2765 (1989), this Court indicated otherwise:

> These holdings, however, have dealt with the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment. In Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), we declined to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences. And in Satterwhite v. Texas, 486 U.S. 249, ___, 108 S.Ct. 1792, ___, 100 L.Ed.2d 284 (1988) we applied the traditional appellate standard of harmless error

review set out in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) when reviewing a claim of constitutional error in a capital case.

We have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. In Smith v. Murray, 477 U.S. 527, 538, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986), a case involving federal habeas corpus, this Court unequivocally rejected "the suggestion that the principles [governing procedural fault] of Wainwright v. Sykes [433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)] apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws" and similarly discarded the idea that "there is anything 'fundamentally unfair' about enforcing procedural default rules . . . ." Id., 477 U.S. at 538-539, 106 S.Ct. at 2668-2669. And, in Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983), we observed that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."

Finally, in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), we held that the Eighth Amendment prohibited the State from executing a validly convicted and sentenced prisoner who was insane at

> the time of his scheduled execution. Five Justices of this Court, however, rejected the proposition that "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." Id., at 411-412, 106 S.Ct. at 2603-2604. Justice Powell recognized that the prisoner's sanity at the time of execution was "not comparable to the antecedent question of whether the petitioner should be executed at all." Id., at 425, 106 S.Ct. at 2610. "It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings do not apply in this context." Ibid. (citations omitted); id., at 429, 106 S.Ct. at 2612 (O'CONNOR, J., joined by WHITE, J., dissenting in part and concurring in result in part) (due process requirements minimal); id., at 434, 106 S.Ct. at 2615 (REHNQUIST, J., joined by Burger, C.J., dissenting) (wholly executive procedures sufficient).

In Giarratano the Court further held that capital defendants are not constitutionally entitled to counsel for post-conviction proceedings simply because they have been sentenced to death. Given the additional safeguards already built into capital trials,

the Court declined to require "yet another distinction between the rights of capital case defendants and those in noncapital cases." Id., 109 S.Ct. at 2771.

The Commonwealth of Kentucky respectfully urges this Court to grant certiorari accordingly.

III.

THE KENTUCKY SUPREME COURT HAS MISAPPLIED THIS COURT'S DECISIONS IN BLOCKBURGER V. UNITED STATES AND WILLIAMS V. OKLAHOMA BY CONCLUDING THAT RESPONDENT CANNOT BE PUNISHED FOR KIDNAPPING AND MURDERING THE SAME VICTIM.

The court below held that Respondent was exposed to double jeopardy by being punished for murdering and kidnapping the same victim. Under Blockburger v. United States, 284 U.S. 299 (1932), there was no double jeopardy violation because murder and kidnapping each require proof of a fact not required for conviction on the other. Despite the clear teaching of Blockburger, the Kentucky Supreme Court directed

that on retrial, Respondent could be convicted of both murder and kidnapping, but death could be imposed for only one of those offenses.

Since Respondent committed two separate and distinct crimes, punishment for the murder of Kevin Miller should not merge into the kidnapping of Kevin Miller or vice versa. "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." KRS 505.020(1); Blockburger, supra, 284 U.S. at 304. Kentucky adopted the Blockburger approach in Wilson v. Commonwealth, Ky., 695 S.W.2d 854 (1985) and Polk v. Commonwealth, Ky., 679 S.W.2d 231 (1984). Thus, the issue is whether the conviction for capital kidnapping required proof of a separate fact not required to prove the

murder. This Court has previously held that capital murder and capital kidnapping are separate and distinct offenses since each requires proof of separate fact not required to prove the other. E.g., Williams v. Oklahoma, 358 U.S. 576, 586-587 (1959).

Under KRS 509.040(1)(b), Kentucky's kidnapping statute, the Commonwealth had to prove Respondent unlawfully restrained Kevin Miller with the intent to advance the commission of a felony (the murder of Kevin Miller). Capital kidnapping further required that the victim not be released alive. KRS 509.040(2). Death of the hostage is not an element of kidnapping, but if it occurs, the Commonwealth may pursue a capital conviction. Id.

By contrast, capital murder has no requirement of restraint. KRS 507.020 and 532.025. Capital murder can be accomplished without any restraint at all. For example, the

sniper picks off his target without confining or moving him; and the bomber who explodes dynamite in a crowded cafe may be miles away from his victims. Capital murder requires either intent to kill or a wanton mental state under circumstances manifesting extreme indifference to human life. Id. Capital kidnapping requires no specific mental state, only that the victim not be released alive or subsequently die from serious physical injuries suffered during the kidnapping. In short, the murderer need not restrain his victim, and the kidnapper need not kill his victim so long as he leaves his victim in a situation he does not survive. Each offense requires proof of a fact the other does not. The Blockburger formula has been satisfied.

"[U]nder the law of Oklahoma, kidnapping is a separate crime, entirely distinct from the crime of murder." Williams v. Oklahoma, at 358 U.S. 586. Soon after robbing a gas station,

Williams abducted one man at gunpoint and forced him to drive down a dead-end road where Williams shot and killed the driver. This Court ruled that the "Oklahoma statutes separately create and define the crimes of murder and of kidnapping, and it is evident from their terms that, as held by the Oklahoma court in this case, they create 'separate and distinct offenses.'" Id., at 358 U.S. 584-585. "[T]he court's consideration of the murder as a circumstance involved in the kidnapping crime cannot be said to have resulted in punishing petitioner a second time for the same offense." Id., at 358 U.S. 586. See also Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862 (1983); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977).

Capital kidnapping and capital murder are separate, distinct crimes. Respondent's jury

considered aggravating and mitigating circumstances for each offense. Just as in Williams, supra, consideration of the murder as a circumstance involved in the kidnapping did not constitute double punishment for the same offense. Appellant was punished once for each separate and distinct offense. The fact that Kevin Miller died only once does not erase either his murder or the torture he endured during the kidnapping. Contrary to the conclusion of the Kentucky Supreme Court, it is not a double jeopardy violation to impose two death sentences for kidnapping and murdering the same victim.

CONCLUSION

WHEREFORE, the Commonwealth of Kentucky respectfully petitions this Court for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY
86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. Honorable Ellen B. Ewing, Judge
Indictment No. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

AND 86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellants' petitions for rehearing are denied.

The opinion rendered June 8, 1989, is modified on its face by the substitution of new pages 3, 4, 5, 6, 7, 8 and 14 to the majority opinion and a new page 2 to the dissenting opinion. A copy of the opinion with the modified pages is attached hereto.

ENTERED: September 28, 1989.

/s/ Robert F. Stephens
Chief Justice

RENDERED: JUNE 8, 1989
TO BE PUBLISHED
MODIFIED: September 28, 1989

SUPREME COURT OF KENTUCKY

86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

and 86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT

REVERSING AND REMANDING

Cosby and Walls were indicted and tried together on charges of robbery, kidnapping and murder. Each was found guilty by jury verdict on all charges, and, pursuant to the jury's

recommendation regarding punishment, each was sentenced to twenty years imprisonment for Robbery I, the death sentence for Murder, and a second death sentence for Kidnapping. They have appealed separately as a matter of right to our Court alleging numerous errors relating both to the guilt phase and to the sentencing process. Because some of the numerous claims of error are congruent or reciprocal, we decide both cases in a single opinion as a matter of judicial economy.

On the night of November 25, 1984, Kevin Miller, Assistant Manager at the Applegate's Landing Restaurant in Louisville, Ky., was robbed shortly after the restaurant was closed, and then abducted and murdered. Two days later Walls, who was being questioned about the robbery and Miller's disappearance, directed police to the place where the body was found, a pond at Fisherman's Park, about seven or eight miles from Applegate's Landing Restaurant, and then made a statement.

The victim had six stab wounds in the back and chest, and his throat had been slashed. His fingertip had a fresh cut covered by a Band-Aid, and there was a hemorrhage beneath the scalp from a blow behind the right ear. A boning knife, identified as the murder weapon, was found stuck in the mud nearby.

The Restaurant's safe had been emptied, and cash register tapes had been removed from a desk inside the office. The victim's car was still parked outside. Blood found on the safe and on the desk matched the victim's blood type and was consistent with the victim's freshly cut finger. There was also type "B" blood found on a bank deposit bag, which is consistent with Cosby's blood type.

Walls gave the police a taped statement confessing to many of the details concerning the planning and execution of the robbery, kidnapping and murder as carried out by him and Cosby. In his statement Walls claimed that as

the time approached to kill the victim he changed his mind and Cosby alone stabbed and slashed the victim to death. Walls then helped Cosby throw the body into the pond.

There are thirty different claims of error asserted in the Brief filed on behalf of Walls, and thirty-five claims of error asserted on behalf of Cosby. In Walls' case only four of the alleged errors were preserved by contemporaneous objection as required by RCr 9.22, and as required for instructions by RCr 9.54(2). See also RCr 10.12. Likewise, in Cosby's Brief the claims of error are largely unpreserved, particularly so with reference to the problems as to Cosby generated by a joint trial and so-called "Bruton" issues. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The Commonwealth urges this Court to reconsider the position stated in Ice v. Commonwealth, Ky., 667 S.W.2d 671, 674 (1984), holding "that in a death penalty case

every prejudicial error must be considered, whether or not an objection was made in the trial court." See also Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 783 (1987), to the same effect. This position is generated by KRS 532.075, the statute specifying the duties of our Court in reviewing death penalty cases, which states in pertinent part that "[t]he Supreme Court shall consider . . . any errors enumerated by way of appeal." The Commonwealth argues that such consideration should be limited to deciding whether the issue was preserved by contemporaneous objection, and, if not, review should go no further. This is a specious argument rendering the statute meaningless. [[We do not agree]], nor do we believe that this statute oversteps the line between judicial and legislative power. It is a function of the General Assembly to say when and if the death penalty shall be imposed, and this includes the right to prescribe the special type

of review of punishment and errors enumerated by way of appeal prescribed in KRS 532.075, limited only by the Kentucky Constitution, the United States Constitution, and the decisions of the United States Supreme Court.

The idea of imposing a higher standard of review in cases where the death penalty has been imposed did not originate with our Court, nor indeed with our Kentucky General Assembly. Its genesis is the opinions of the United States Supreme Court which have stated in many cases that "death is a different kind of punishment from any other" invalidating procedural rules that tend to "diminish the reliability of the sentencing determination," and "of the guilt determination" as well. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, 403 (1980). Because of the "qualitative difference" from a crime punished by a term of years, "there is a corresponding difference in the need for reliability . . . ." Woodson v. North Carolina,

428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Our statute and our standard of review is but a codification of the United States Supreme Court mandate.

However, there appears to be some need for clarification. Contrary to the Commonwealth's suggestion, we have never suggested that the rules of preservation do not apply "at all" in capital cases. Nor do we interpret KRS 532.075(2) as requiring "total abandonment of the rules of preservation." On the contrary, Ice specifies only that "prejudicial error" must be reviewed regardless of contemporaneous objection, and we hasten to reaffirm that this means errors where there is no reasonable justification or explanation for defense counsel's failure to object, tactical or otherwise, and the totality of circumstances persuades this Court that the defendant may not have been found guilty of a capital offense or

the death penalty may not have been imposed but for the unpreserved error.

Unfortunately, there is one such error in these proceedings. The strongest evidence against Cosby was inextricably bound up in the statement by his codefendant, Walls, so much so that deleting or redacting Cosby's name when the Walls' statement was read to the jury could not possibly have cured the prejudicial effect of this statement against Cosby. We are compelled to conclude that Cosby was so badly prejudiced by the failure to provide separate trials that his convictions must be reversed. In the peculiar circumstances of this case the jury could not "individualize [Cosby] in his relation to the mass" of evidence represented by Walls' statement. the test specified in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, 1571 (1946). Ultimately, when this statement was being used in closing argument to imply Cosby was the

killer, the court admonished the jury that Walls' statement was not evidence against Cosby, but this was as likely to compound the error as to cure it.

The Commonwealth, not the trial court,/is responsible for this reversal because the Commonwealth Attorney, not the trial court, made the decision to try Cosby jointly with Walls. The Commonwealth bears responsibility for knowing before trial the case that will be presented, and then assessing the impact on the trial as a whole of evidence admissible against one defendant and not the other.

The Commonwealth's Brief conceded that the case against Cosby, while enough to submit to a jury, was "not overwhelming." It consisted of circumstantial evidence that he, like Walls, was an employee of Applegate's Landing Restaurant and in rather desperate financial circumstances. Cosby admitted that he was with Walls on the night in question. He had driven

to Walls' apartment about nine that evening, and left with him, returning some time around 11:30 p.m. He was seen by an eyewitness in Applegate's parking lot sitting in Walls' car shortly before closing time. The drop of type "B" blood on the money bag, matching Cosby's blood type, was further evidence against him. Perhaps most critically, after he returned with Walls to Walls' apartment, he was seen by Walls' wife removing a small box from the back of Walls' car, appearing to be dividing up something, and then putting the box with the remainder in it in his car before leaving.

The victim's girlfriend testified that Walls (the man Cosby was with) gained entry into the Restaurant on the pretext of needing to get "some papers out of my locker" just as the Restaurant was closing, at 11:00 p.m. This evidence, taken together with physical evidence establishing the robbery, the abduction and the murder, would have been sufficient to support

Cosby's conviction in a separate trial where Walls' statement would not be part of the evidence. While circumstantial and not overwhelming, the individualized evidence against Cosby is ample to meet the test of proof sufficient to induce conviction of guilt beyond a reasonable doubt of all the elements of the crimes charged. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The fundamental premise in Bruton v. United States, supra, is that the confession of a codefendant when utilized as evidence in a joint trial is prejudicial hearsay as to the nonconfessing defendant to the extent that it incriminates him, and cannot be used unless the name of the nonconfessing defendant can be so redacted or deleted that its use is harmless beyond a reasonable doubt. Otherwise, it violates the accused's fundamental right, guaranteed by the Sixth Amendment, to be

confronted by the witnesses against him. We are cognizant, indeed appreciative, of the recent United States Supreme Court decision in Richardson v. Marsh, 481 U.S. 200, 109 S.Ct. 1702, 95 L.Ed.2d 176, 187 (1987), extolling the value of joint trials to enhance "both the efficiency and the fairness of the criminal justice system." This was a case where one defendant, but not both, made incriminatory statements which, when properly redacted, were used as evidence. But the criminal law to be credible must be concerned with substance, not to be confused with empty formality. The rule in Richardson v. Marsh, as indeed the principle in its precursor from our state, Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), is that a joint trial utilizing a properly redacted statement is appropriate where given the totality of the circumstances no substantial prejudice will result. It is appropriate where the statement

does not provide details that point unerringly to the nonconfessing defendant. Indeed, although inappropriate, it is not reversible error where the proof against the nonconfessing codefendant is so overwhelming that no possible prejudice resulted, the "harmless beyond a reasonable doubt" standard that applies to constitutional error. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 711 (1967).

Unfortunately, from the record before us it is evident that such was not the case here. In his opening statement the Commonwealth Attorney told the jury that he was going to show them that Cosby had the knife in his hand, which he could only do based on Walls' statement. Walls' counsel made statements in closing argument that went so far towards implying that Cosby was the "blank" referred to in Walls' statement that the court felt compelled, on its own initiative, to advise the jury at that time that it was "not to

consider the statement . . . as evidence against Mr. Cosby in this case." In ruling on Cosby's motion for a directed verdict the trial court made statements suggesting that the evidence confirming Cosby's guilt was inextricably bound in Walls' statement. Apparently, even the trial judge could not "individualize [Cosby]" in his relation to the mass of [evidence]. Kotteakos v. United States, supra. The only responsible conclusion is that in present circumstances this cannot be done. The proof is overwhelming as to Cosby, but only because Walls' statement is there to incriminate him. Our responsibility to uphold the criminal justice system transcends our aversion to granting this malefactor a new trial wherein the principal evidence against Cosby will never see the light of day unless Walls takes the stand to testify against him. If, as Walls claims, Cosby was more blameworthy than he, perhaps this can be arranged at the next trial.

These same considerations of prejudice do not obtain in the Walls case. Like Cosby, Walls also failed to pursue a severance as provided in RCr 9.16. Unlike Cosby, there was overwhelming evidence that Walls was guilty as a participant in the robbery and the abduction, and in the murder as well, although his statement shifts blame to Cosby for going through with the murder when he had changed his mind about killing the victim.

Nevertheless, there is at least one critical error in Walls' case, once again precipitated by the joint trial, and this issue was preserved. Over objection Walls' wife was forced to testify on the theory that her testimony was competent as to his codefendant Cosby even though under KRS 421.210(1) she could not be compelled to testify against her husband. But her testimony provided important details incriminating <u>both</u> defendants. It covered their activities before and after the crimes took place and provided

crucial evidence about how, after they returned in Walls' car around 11:30 or 11:45 p.m., first they sat together in the car talking and then Cosby got something out of the backseat of Walls' car and put in the trunk of his own car. She also gave details about the Walls family's bad financial circumstances which reflected on motive and she testified about how Walls washed his tennis shoes after he came home that night.

The trial court limited the Commonwealth in questioning Mrs. Walls only on the subject of "communications that occurred between herself and Mr. Walls when no one else was present."

As we explained in Estes v. Commonwealth, Ky., 744 S.W.2d 421 (1987), "KRS 421.210(1) provides two separate rules:"

> "1) A Testimonial Disqualification--A husband and wife are disqualified from giving testimony regarding 'confidential communications between them during marriage,' as in the former common law disqualification.
>
> 2) A Testimonial Privilege--'Further, neither may be compelled to testify for

> or against the other,' similar to the privilege against self-incrimination." Id. at 424.

Thus, there are two prongs to this statute, the second prong being a "Testimonial Privilege," and, as we stated in Estes "we must recognize [the wife's] right to refuse to give testimony of any kind against her husband, without regard to whether it is a confidential communication." Id. at 425.

In Maddox v. Commonwealth, Ky., 503 S.W.2d 481 (1973), this Court analyzed a factual and legal situation squarely in point. The brothers Maddox were jointly indicted and tried for stealing cattle. The prosecutor called Joyce Maddox, wife of Billy, who was required to testify against her will "on the theory that her testimony would be competent as against Jimmy," and we stated this was "reversible error as to appellant Billy Maddox as it is impossible to limit the effect of her testimony to Jimmy Maddox alone." Id. In the present case the

testimony from Walls' wife implicated Walls as well as Cosby and added critical weight to the prosecution's case because it corroborated his incriminating statement. This is an error that would never have occurred had the Commonwealth had the foresight to require separate trials.

Walls also claims he was prejudiced by the joint trial because Cosby testified and Walls did not, and then Walls' counsel was denied an opportunity to offer an explanation as to why he chose not to testify. Further, Walls claims he was prejudiced because the edited version of his statement read to the jury, deleting Cosby's name and replacing it with the designation "blank" watered down the exculpatory and mitigating value of those self-serving portions of his statement blaming Cosby for going through with the murder after Walls no longer wanted to kill their victim. These arguments, in themselves, are not substantial. Nevertheless,

they represent problems that do not occur with separate trials.

The appellants have received two separate death penalties, one for murder and one for kidnapping. The appellants make a technical argument that neither the indictment nor the instructions presented an issue of capital kidnapping. First they point to the indictment as insufficient because the offense of kidnapping, as set out in Count II, does not allege the facts necessary to elevate the crime to status as a capital offense. Kidnapping is only a "capital offense when the victim is not released alive or when the victim is released alive but subsequently dies as a result of" certain conduct by the kidnappers as specified in the statute. KRS 509.040(2). On the other hand, the heading above the indictment said "Capital Kidnapping," and the Commonwealth filed a notice of aggravating factors as required by KRS 532.025(1) advising:

> "[T]he Commonwealth will seek the death penalty . . . on the theory that the offenses of Murder and Kidnapping were aggravated by the fact that they were committed during the course of a Robbery First Degree."

We need not decide whether the indictment as supplemented by the "notice of aggravating factors" is sufficient since we have ordered new trials and the indictment can, in any event, be amended. And, for the same reason, we need not address the claim of procedural noncompliance appellants assert on grounds that the necessary element to prove capital kidnapping, that "the victim is not released alive," was first presented as a jury issue only at the penalty phase. The appellants were not found guilty of this element at the trial phase. But there was no objection to this trial procedure. If the appellants believe our death penalty statute, KRS 532.025 requires that this factor be found in the guilt as well as the penalty phase, they may so request at the next trial.

A more serious argument arises out of the double death penalty, one imposed for murder and one for kidnapping, when the same act of murder provided the aggravating circumstances in both instances. Because this is a double jeopardy claim it must be considered even though it was not preserved for objection by appellate review. Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977).

The gist of the double jeopardy claim is that the same element that enhances kidnapping to capital kidnapping so that the death penalty can be imposed, causing the death of the victim, is also punished by the death penalty a second time as murder.

Under KRS 505.020(2)(a) one offense merges with another when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the [other] offense." This is a statutory codification of

the Blockburger test used by the United States Supreme Court to define violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger rule cannot be applied simply in the abstract. While we could invent abstract scenarios in which a person might be guilty of capital kidnapping although the victim was not murdered, where, as here, the proof relied upon to elevate the offense of kidnapping to capital kidnapping is the proof that the victim was murdered, the offenses merge. The phrase in the capital kidnapping statute, "when the victim is not released alive," refers to the victim's death being caused by some aspect of the kidnapping, not to a fortuitous and unrelated circumstance.

While capital kidnapping required proof of facts not required for murder, murder here did not require proof of any fact not included in

capital kidnapping. Blockburger, 284 U.S. at 304; 52 S.Ct. at 182.

When the death is related to the kidnapping it is a crime covered by Chapter 507, Criminal Homicide, and punishable as one of the degrees of criminal homicide specified therein. There are two prongs to the double jeopardy principle. A person cannot be twice convicted or twice punished for the same murder. In a new trial the Commonwealth may try the appellants for both kidnapping and murder but at the sentencing phase it must elect to seek the death penalty for either kidnapping or murder. [[Murder and kidnapping merge at the enhancement stage. The additional element that aggravates kidnapping to a capital offense is the murder. The defendant can be convicted and punished for both offenses, but not sentenced to death for kidnapping if he is sentenced to death for murder.]]

The appellants' remaining claims of error are not substantial. Since there will be a remand, it is not necessary that they be addressed in this Opinion. No remaining claim of error which we might address in this Opinion was challenged by contemporaneous objection. We must assume that at new trials counsel for appellants will feel constrained to object where they deem it appropriate, and they are forewarned that failure to do so places them under a heavy burden in the appellate court.

The convictions of both Cosby and Walls are reversed and both cases are remanded to the trial court for further proceedings consistent with this Opinion.

Stephens, C.J., Combs, Gant, Lambert, and Leibson, JJ., concur. Wintersheimer, J., concurs in results only. Vance, J., dissents by separate opinion, [[in which Gant, J., concurs.]]

RENDERED: JUNE 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-378-MR

TEDDY LEE COSBY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

86-SC-385-MR

CHRISTOPHER CHARLES WALLS — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HON. ELLEN B. EWING, JUDGE
INDICTMENT NO. 84-CR-1822

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE VANCE

Respectfully, I do not agree that the judgment should be reversed as to the appellant Christopher Charles Walls. I concede that his wife was erroneously required to give testimony against him but in view of the detailed

statement which he gave concerning his own participation in the crime, I believe that the testimony of his wife was of little consequence in influencing the jury verdict. I concur in the reversal of the judgment against appellant Teddy Lee Cosby but would affirm the judgment against the appellant Walls.

[[Gant, J., joins in this dissent.]]